No. 96-6839

In The

Supreme Court of the United States

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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I. AS A MATTER OF STATUTORY CONSTRUCTION, 8 U.S.C. § 1326(b)(1) AND (b)(2) MUST BE READ AS CREATING SEPARATE AND DISTINCT OFFENSES FROM THE OFFENSE DESCRIBED IN 8 U.S.C. § 1326(a), RATHER THAN SENTENCING ENHANCEMENTS OF THE OFFENSE DESCRIBED IN § 1326(a).

A. The Statutory Text and Structure of 8 U.S.C. § 1326(b)(2) Establish That It is a Separate and Distinct Offense from That Described in 8 U.S.C. § 1326(a).[1]

1. The Statute Itself.

The Government argues first that "[t]he text of 8 U.S.C. [§] 1326 reflects Congress's intent to define a single offense based on a deported alien's illegal reentry, and to vary the severity of the penalty according to the offender's criminal history before his deportation." Resp. Br. 12. In support of this argument, the Government points chiefly to the use of the phrase "[s]ubject to subsection (b)" in subsection (a) of § 1326, and the use of the phrase "[n]otwithstanding subsection (a)" in subsection (b) of § 1326. Resp. Br. 12-13. However, these phrases

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[1] Contrary to the Government's suggestion, Resp. Br. 11 fn. 2, Petitioner does **not** contend that this Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985) "requires application of the four-factor test developed by the Fifth Circuit in *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986) [or] that that test is dispositive." Nor does Petitioner claim that the Fifth Circuit's application of the *Davis* test "represent[s] a wholly 'alternative analysis' " for deciding this question. Resp. Br. 20 fn.9. Rather, the *Garrett* factors represent a nonexclusive subset of factors courts have examined in deciding this question. *See, e.g., United States v. Forbes*, 16 F.3d 1294, 1298 (1st Cir. 1994) (*Garrett* factors are helpful, but not conclusive in resolving this question).

cannot bear the weight which the Government places upon them.

The Government posits that "the introductory clause, '[s]ubject to subsection (a),' conditions the severity of the penalty imposed under subsection (a) on any modification of the authorized penalty that is required by subsection (b)." Resp. Br. 12. But this phrase is just as likely to mean that both (a) and (b) are offenses, and that a prosecutor is not limited to prosecuting the crime described in (a) where she may charge the crimes described in (b).

Citing dictionary definitions of the word "notwithstanding," the Government also argues that "the phrase '[n]otwithstanding subsection (a)' authorizes imposition of the greater penalties specified in subsection (b) for a subset of aliens who violate subsection (a), in spite of the lesser penalty otherwise provided for in subsection (a)." Resp. Br. 13. But the Government's argument proves too much. Under the dictionary definitions cited by the government, the word "notwithstanding" signals a complete negation or rejection of the particular thing referenced. Thus, the phrase "[n]otwithstanding subsection (a)" indicates a **complete** rejection of subsection (a) – not just the partial rejection argued by the government (*i.e.*, the rejection of only the part pertaining to permissible punishments). Such a complete rejection is an indication that subsection (b) was meant to stand alone as a separate offense. At least one judge has so recognized. *See United States v. Vasquez-Olvera*, 999 F.2d 943, 948 (5th Cir. 1993) (King, J., dissenting), *cert. denied*, 510 U.S. 1076 (1994).

As the First Circuit, through a panel including then-Chief Judge Breyer, persuasively explained, it is

> just as likely, however, that subsection (b) incorporates the offense described in subsection (a), and simply adds the additional element regarding a prior conviction of a felony or aggravated felony . . . The fact that each subsection makes reference to the other is simply the logical way of indicating the relationship between the arguably two separate crimes.

Forbes, 16 F.3d at 1298 (citations omitted).

The Government also inaccurately argues that "the application of subsection (b) is predicated on a violation of subsection (a). . . . " Resp. Br. 14 (emphasis added). This is emphatically not so. Subsection (b) states that it applies "in the case of any alien described in" subsection (a). Although Congress could easily have provided that subsection (b) would apply in the case of a "conviction under subsection (a)" or in the case of a "violation of subsection (a)," it did not do so.[2] This failure to do so is significant since, "[w]hen Congress intended that the defendant have been previously convicted, it said so," by explicitly using words like "conviction" or "convicted." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 n.7 (1985).

Finally, Congress did not simply append the contents of § 1326(b) as an addendum to the already-existing § 1326(a), but rather made § 1326(b) a separate subsection, with a separate letter. This strongly counsels in favor of finding that a separate offense was intended. *See, e.g., United States v. Ryan*, 9 F.3d 660, 667 (8th Cir. 1993) ("lack of clear division into separate sections suggests

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[2] This failure distinguishes the statute at issue in this case from the statute discussed by the Government in its brief – 21 U.S.C. § 841. Resp. Br. 14-15 fn.4. In that statute, Congress explicitly premised the enhanced penalties in § 841(b) upon a "violation" of § 841(a). Section 841 is also distinguishable from the statute at issue in this case in another important respect: § 841(a) is explicitly labeled "Unlawful acts," while § 841(b) is explicitly labeled "Penalties." The lack of such labels in § 1326 is significant. As one judge has noted, "Congress could have easily titled subsection (b) as a penalty provision, which it chose not to do; the failure to do so is noteworthy." *Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting).

treatment of contents as a single offense"), *aff'd on reh'g en banc*, 41 F.3d 361 (8th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1082 (1995); *United States v. Hawkins*, 811 F.2d 210, 218-19 (3rd Cir.) (same), *cert. denied*, 484 U.S. 833 (1987).

2. The 1988 Amendment by Which § 1326(b) Was Added.

The Government's position is likewise unsupported by the text and structure of the 1988 amendment which added subsection (b) to § 1326. Pointing to the 1988 addition of the words "[s]ubject to subsection (b)," the Government then argues that "[i]f Congress had intended to create a new substantive offense through subsection (b), there would have been no reason to change the text of subsection (a). The text would have remained unaltered as a substantive matter, and subsection (b) would have been drafted in a parallel fashion to identify the elements of whatever new offense was intended." Resp. Br. 16.

As pointed out by the First Circuit, however, it is at least equally plausible that "the fact that each subsection makes reference to the other is simply the logical way of indicating the relationship between the arguably two separate crimes." *Forbes*, 16 F.3d at 1298. Moreover, there is at least one other plausible reason for the inclusion of the "[s]ubject to subsection (b)" language, namely: to forestall the claims of defendants that the Government was required to prosecute them for the less severely punished crime set out in § 1326(a), rather than the more harshly punished offenses set out in § 1326(b)(1) or (b)(2).[3]

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[3] For examples of such claims, *see, e.g., United States v. Batchelder*, 442 U.S. 114 (1979) and *United States v. Jackson*, 805 F.2d 457 (2nd Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

The Government misplaces reliance on the fact that the 1988 amendment added the title "Criminal Penalties For Reentry of Certain Deported Aliens." Resp. Br. 15-16. All criminal laws involve the creation of penalties. For instance, Congress originally created 8 U.S.C. § 1326 along with a number of other offenses under Chapter 8 of the Immigration and Nationality Act of 1952. Chapter 8 was entitled "General Penalty Provisions." Pub. L. No. 82-414, 66 Stat. 271-280 (June 27, 1952). Likewise, 18 U.S.C. § 2119, the "carjacking" statute, was enacted in the "Anti Car Theft Act of 1992" under Subtitle A: "Enhanced Penalties for Auto Theft" and Section 101: "Federal Penalties for Armed Robberies of Autos." Pub. L. No. 102-519, 106 Stat. 3384 (October 25, 1992). *See also* 18 U.S.C. § 2332.

B. Subsequent Amendments to § 1326 Also Support the Conclusion That § 1326(b)(1) and (b)(2) Were Intended to Be New Offenses; and the Legislative History Does Not Support a Contrary Conclusion.[4]

1. The Legislative History Surrounding the Enactment of § 1326(b).

While Petitioner does not concede that it is proper to examine legislative history to clarify a textually ambiguous criminal statute, such an examination nevertheless does not compel the result urged by the Government. The

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[4] Unlike the Government, Petitioner draws a distinction between an analysis of subsequent amendments to a statute and "legislative history." For Petitioner, the latter includes only the intermediate steps – *e.g.*, committee reports and floor debates – to the final product as enacted by Congress and signed into law by the President. Where the term "legislative history" is used in this brief and in Petitioner's opening brief, it is used with that understanding of the term.

Government begins its dissection of the legislative history by discussing two bills which were not enacted into law. Resp. Br. 21-22. However, as this Court has noted, "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969) (citations omitted); *cf. Puerto Rico Dept. Of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws.").

The Government also points to remarks of various sponsors of the Senate bill which was the precursor for the ultimate legislation adding § 1326. Resp. Br. 22-23. However, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *accord Consumer Product Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 118 (1980); *see also Garcia v. United States*, 469 U.S. 70, 76 (1984) ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted).

Indeed, Committee Reports on the bill are the type of legislative history viewed as most "authoritative" by this Court. *Garcia*, 469 U.S. at 76 (citations omitted). Yet the Government concedes that "[n]o Senate or House report was submitted with the final legislation." Resp. Br. 23 fn.11. Thus, those courts which found the legislative history of § 1326(b) unhelpful were right. *See Forbes*, 16 F.3d at 1298; *Vasquez-Olvera*, 999 F.2d at 946; *see also id.* at 949 (King, J., dissenting); *United States v. Campos-Martinez*, 976 F.2d 589, 592 (9th Cir. 1992).

2. Subsequent Amendments to § 1326.

The Government's arguments notwithstanding, Resp. Br. 24-25, Congress did more than simply "updat[e] the various fine provisions" of § 1326 in the 1990 amendments. Resp. Br. 25. As previously discussed, Pet. Br. 15-16, Congress also made the language of § 1326(a), (b)(1), and (b)(2) parallel, evidencing Congress's always-held intention that these provisions receive parallel treatment – *i.e.*, each as a separate offense.

Even more significantly, in the 1990 amendments Congress deleted the phrases "shall be guilty of a felony" and "upon conviction thereof" from § 1326(a). Had this statute remained as it was prior to 1990 – with a reference to § 1326(a) as a felony of which one could be convicted, but no similar reference in § 1326(b)(1) or (b)(2) – the Government would now be arguing that this difference in language supported its argument. Congress's purposeful **eradication** of this difference in language in 1990 therefore supports Petitioner's position.[5]

In addressing the 1994 amendments, the Government makes the following argument: under Petitioner's reasoning, the addition of the "three or more misdemeanors"

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[5] Contrary to the Government's suggestion, Resp. Br. 25, the titles of the sections of the bill containing the 1990 amendments – "Increase in Fine Levels: Authority of the INS to Collect Fines" and "Criminal Fine Levels" – do not defeat Petitioner's argument. In Congress's collective mind, the thrust of the 1990 amendments was **not** to make § 1326(b)(1) and (b)(2) separate offenses, **because Congress believed it had already done so in 1988.** In Congress's collective mind, the only change that was being wrought was in the fine levels: hence the titles of the amending sections. In other words, Petitioner is not suggesting that, in the 1990 amendments, Congress **made** (b)(1) and (b)(2) separate offenses. Rather, Petitioner is arguing that, in these amendments, Congress **clarified** its 1988 intention to make (b)(1) and (b)(2) separate, free-standing offenses.

language to § 1326(b)(1) in 1994 would create yet another substantive offense, *i.e.*, illegal reentry after deportation following conviction for "three or more misdemeanors involving drugs, crimes against the person, or both." The Government then points to the title of the section containing the 1994 amendments – "Enhancement of Penalties For . . . Reentering, After Final Order of Deportation" – as inconsistent with such an intention. Resp. Br. 25-26.

The short answer is that the title of these amendments is perfectly consistent with the principal thrust of the 1994 amendments, namely: the increase of the maximum penalties for § 1326(b)(1) and (b)(2), from 5 and 15 years, to 10 and 20 years, respectively. Certainly Congress is under no obligation to include in the title of its amending legislation every single purpose which that legislation seeks to accomplish.

With respect to the 1996 amendments, the Government protests first that "Petitioner cites no legislative history or other authority to support his claim that [8 U.S.C. § 1326(b)(3), added in 1996] creates a new substantive offense, and is not merely a sentencing provision." Resp. Br. 27-28. Notably, the Government cites none to support the contrary position. An examination of the text of that provision clearly reveals that it is a new substantive offense.

The Government also attempts to discount the significance of the 1996 addition of § 1326(d), respecting collateral attacks of underlying deportation orders. Resp. Br. 28. However, the Government utterly fails to explain why Congress felt it necessary, in § 1326(d), to speak of "deportation order[s] described in subsection (a)(1) **or subsection (b)** of this section. . . . " (emphasis added), **if, in fact, the sole substantive offense is contained in subsection (a)**. The Government also completely fails to address Petitioner's argument that, since the text of

§ 1326(b) is itself devoid of any mention of "deportation order[s]," any deportation order "described in . . . subsection (b)" is solely through incorporation from subsection (a) – thus reinforcing the conclusion that Congress intended to incorporate the elements of subsection (a) into subsection (b), thereby making subsections (a), (b)(1), and (b)(2) each a separate, free-standing offense.

With respect to § 1326(b)(4), the Government admits that this provision is susceptible of interpretation as a new offense, rather than a sentencing enhancement, Resp. Br. 30; but then fails to address the illogic of Congress's putting a new substantive offense into a subsection with sentencing enhancements. It would make very little sense for Congress to have lumped together, into a single subsection of § 1326, two sentencing enhancements ((b)(1) and (b)(2)), and two substantive offenses ((b)(3) and (b)(4)). The more logical conclusion is that Congress saw no anomaly in adding (b)(3) and (b)(4) to § 1326(b) because it viewed each of the subdivisions of subsection (b) as setting out a new substantive offense.

The Government also makes much of the fact that, in the second set of 1996 amendments, Congress amended subsection (a), but not subsection (b), to extend it to aliens who "departed the United States while an order of exclusion or deportation is outstanding." Resp. Br. 30-31. The Government claims that "[b]y adding that provision to subsection (a), Congress made clear that the offense conduct in Section 1326 is defined by that Section 1326 subsection, not by the penalty enhancement provisions found in subsections (b)(2)." Resp. Br. 30-31.

What the Government overlooks is that there was no need for Congress to include such language in subsection (b), because any amendment of subsection (a) is automatically incorporated into (b). Subsection (b) applies "in the case of any alien described in [subsection (a)]. . . . " This

language incorporates the offense described in (a), however that offense might be defined. *See Forbes*, 16 F.3d at 1298; *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting).

Finally, Petitioner notes that the Government has offered no explanation for Congress's purposeful reference to the "**offenses** under section . . . 276(b) of the Immigration and Nationality Act (8 U.S.C. . . . 1326(b)). . . . " Pub. L. No. 104-208, 110 Stat. 3009, § 334 (Sept. 30, 1996) (emphasis added). The Government contends that because "[t]he 1994 statutory amendment that was the basis for Congress's directive amended only subsection (b), not subsection (a) [of § 1326,] [t]herefore, it was natural for Congress to cross-reference only that subsection in its directive." Resp. Br. 32. Yet this does nothing to explain Congress's use of the word "offenses" to describe the provisions of § 1326(b)(1) and (b)(2) – a word which "is a technical term in the criminal law, referring to a crime made up of statutorily defined elements." *United States v. LaBonte*, ___ U.S. ___, 117 S.Ct. 1673, 1683 (1997) (Breyer, J., dissenting) (citations omitted).

In sum, the subsequent amendments to § 1326, in conjunction with the text of that statute as first amended in 1988, lead to the conclusion that, in § 1326(b)(1) and (b)(2), Congress intended to create new, separate offenses, not merely sentencing enhancements of the offense found in § 1326(a). Nothing about the legislative history surrounding the 1988 (or subsequent) amendments alters that conclusion. Therefore, this Court should hold that 8 U.S.C. § 1326(b)(2) describes a separate and distinct offense from that described in § 1326(a), and that, therefore, the "aggravated felony" portion of § 1326(b)(2) is an element which must be charged in the indictment and proved beyond a reasonable doubt before a defendant may be subjected to the term of imprisonment set out in § 1326(b)(2).

C. At Best, the Statute in Question is at Least Ambiguous; and, in that Case, the Rule of Lenity Requires that § 1326(b)(1) and (b)(2) Be Read as Creating New Offenses.

The Government exhibits a fundamental misunderstanding of the rule of lenity. The Government claims that "the statute in this case does not implicate the principal purpose of the rule of lenity, *i.e.*, to ensure that criminal statutes will provide fair warning concerning criminal conduct rendered illegal." Resp. Br. 34 (internal quotation marks and citation omitted). At issue here, though, is not whether there is fair warning that the conduct is illegal. Rather, what is at issue is whether the defendant has fair warning of the **penalty** attached to the alleged illegal conduct set out in the indictment. *BMW of North America, Inc. v. Gore*, ___U.S.___, 116 S.Ct. 1589, 1598 (1996).

Furthermore, this Court has consistently applied the rule of lenity where "fair warning" was not the issue. *E.g., Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Toussie v. United States*, 397 U.S. 112, 122-23 (1970) (rule applied in determining when statute of limitations began); *cf. United States v. Bass*, 404 U.S. 336, 347-50 (1971) (fair warning only one basis of rule of lenity).

The Government also misunderstands how the rule of lenity operates. The Government argues that the rule of lenity should be applied with a view to what is most lenient for criminal defendants "as a general matter," rather than what is most lenient for a particular individual defendant. Resp. Br. 34. This argument is, however, firmly rebutted by this Court's opinion in *United States v. Granderson*, 511 U.S. 39 (1994), in which the Government argued, and this Court agreed, that, for the particular ambiguous statute at issue in that case, the rule of lenity would compel a different interpretation of the statute for certain defendants than the interpretation given to the

statute by the Court for the particular petitioner in that case. *See Granderson*, 511 U.S. at 57 n.15. *Granderson* thus stands for the propositions that the rule of lenity is defendant-specific; and that where a statute is ambiguous, it must be given the interpretation most beneficial to **the particular defendant under consideration**.

Building on its erroneous premise, the Government urges that the rule of lenity still compels the interpretation of the statute urged by it because "while a particular Section 1326 defendant who was indicted only under subsection (a) would be benefited by treating subsection (b) as a separate offense, future defendants would likely have more to lose than gain from th[at] interpretation." Resp. Br. 35 (internal quotation marks and citation omitted). Particularly, the Government refers to "the possible prejudice to a defendant when his prior conviction is disclosed at trial." Resp. Br. 34.

There is no merit to the Government's suggestion. First, as the Government itself recognizes, the rule of lenity is concerned with "the substantive scope of criminal statutes and whether a sentence has been authorized by law." Resp. Br. 34. Second, this Court has recently noted that any potential prejudice may be minimized to an acceptable level by an evidentiary stipulation, thus precluding the need for the prosecution to prove up the conviction by other means which might bring the prior offense conduct up before the jury. *See Old Chief v. United States*, ___ U.S. ___, 117 S.Ct. 644 (1997).

In sum, the language and structure of § 1326 compel the conclusion that Congress intended to create new, separate offenses in § 1326(b)(1) and (b)(2), not merely sentencing enhancements of the offense described in subsection (a). Even if there is any ambiguity, however, the rule of lenity likewise compels the same conclusion in

this case. Therefore, this Court should so hold, and, consistent with that holding, should vacate the judgment of the Fifth Circuit in this case and remand for further proceedings.

II. THE CONSTITUTION REQUIRES THAT, IN A FEDERAL CASE, WHENEVER THE MAXIMUM IMPRISONMENT RANGE IS INCREASED BASED ON A FACT, THAT FACT MUST BE ALLEGED IN THE INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT IN A JURY TRIAL

A. The Fact that Petitioner Was Indicted for a Felony Offense is Irrelevant.

The Government first argues that the Petitioner's right to a grand jury indictment has not been violated, because Petitioner was prosecuted by indictment, and because the enhancement does not change the nature of the offense from a misdemeanor to a felony. Resp. Br. 36 fn. 18. The fallacy of this argument is easily shown: if a person is in fact charged by indictment for a misdemeanor offense, he may not be punished for a felony if the facts, or elements, that justify the felony punishment are not alleged.

At common law an indictment for larceny must allege the value of the thing taken, so "that it may appear whether it be grand or petit larciny [sic]; and whether entitled to the benefit of clergy. . . . " 4 W. Blackstone, *Commentaries on the Laws of England*, Ch. 23. Further, even if the indictment alleged a felony, it had to allege facts to indicate whether benefit of clergy, which excused the offender from the death penalty for the grand larceny, could apply. *Id.* This Court also has held that where an indictment fails to allege value, the defendant cannot suffer the increased punishment based on value. *Tinder v. United States*, 345 U.S. 565, 569 (1953). Thus the right to

have the facts alleged in the indictment is not based on the fact that the offense is labeled a felony, but on the potential for an increased penalty. *See Schooner Hoppet and Cargo v. United States*, 11 U.S. 389, 394 (1932); Pet. Br. 39-48.

B. Supreme Court Authority.

1. *McMillan v. Pennsylvania*.

The Government disputes the idea that the holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) was predicated upon the fact that the statute there did not enhance the maximum sentence. Resp. Br. 39-40. But the Court was explicit in limiting its holding to facts which determine the severity of a sentence within a sentence range. *Id.* at 82, 83 & 87-88.

Furthermore, the difference between *McMillan* and *Patterson v. New York*, 432 U.S. 197 (1977), on the one hand, and *In re Winship*, 397 U.S. 358 (1970), *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Specht v. Patterson*, 386 U.S. 605 (1967) on the other, controls the outcome of this case. *See McMillan*, 477 U.S. at 91. The difference is that in *McMillan* and *Patterson*, the statutes did require proof beyond a reasonable doubt of those facts that the legislature had decreed were necessary to justify the maximum punishment; whereas, in *Winship*, *Mullaney*, and *Specht*, the statutes in question did not. *McMillan*, 477 U.S. at 82-84; *Patterson*, 432 U.S. at 206, 212-216; *Winship*, 397 U.S. 360; *Mullaney*, 421 U.S. at 706 (Rehnquist, J., dissenting); *Specht*, 386 U.S. at 607-10.

2. *Hildwin, Spaziano,* and *Walton*.

The Government mistakenly relies upon *Hildwin v. Florida*, 490 U.S. 638 (1989), *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Walton v. Arizona*, 497 U.S. 639 (1990).

Resp. Br. 36. In each of those cases, every fact necessary to put the person in the range of punishment which included a possible death penalty was alleged in the indictment and proved to a jury beyond a reasonable doubt. *Hildwin*, 490 U.S. at 638-39; *Spaziano*, 468 U.S. at 450-51; *Walton*, 497 U.S. at 645. These three cases held only that it is not necessary that the jury make the fact findings that determine the ultimate sentence. *Hildwin*, 490 U.S. at 640-41; *Spaziano*, 468 U.S. at 460; *Walton*, 497 U.S. at 648-49.

3. *Specht*.

The Government argues that *Specht v. Patterson* does not support Petitioner's cause. But the Court in *Specht* distinguished the issue there from the issue in *Williams v. New York*, 337 U.S. 241 (1949). In *Williams*, the Court was faced with sentencing procedures to determine the actual punishment, albeit the death penalty, within a range of punishment established for the offense of conviction. *Specht*, 386 U.S. at 606-08. On the other hand, in *Specht* the facts found by the jury established one range of punishment, but a new, higher maximum punishment could be assessed based on "a new finding of fact." *Id.* at 608.

4. *Parke v. Raley* and *Addington v. Texas*.

The Government also relies upon this Court's decision in *Parke v. Raley*, 506 U.S. 20 (1992) to support its assertion that *Addington v. Texas*, 441 U.S. 418 (1979) "is simply irrelevant." Resp. Br. 38 fn. 20. *Parke* is no support for this position. The Kentucky statute at issue in *Parke* did require that the recidivist enhancement be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Price v. Commonwealth*, 666 S.W.2d 749 (Ky. 1984); *Parke*, 506 U.S. at 23. *Parke* dealt only with the issue of

whether a prior conviction would be presumed to be valid. *Id.* at 28. Thus, *Parke* is irrelevant.

5. *Graham v. West Virginia* and *Oyler v. Boles*

The issue in *Graham v. West Virginia*, 224 U.S. 616 (1912), was whether the allegation of the prior conviction used for enhancement must be included in the indictment charging the new offense. The issue in *Oyler v. Boles*, 368 U.S. 448 (1962), was whether the defendant must receive notice of the recidivist enhancement prior to trial. In both cases the defendants were formally charged by information[6] and the statutes required the state to prove the prior convictions to a jury. *Graham*, 224 U.S. at 621; *Oyler*, 368 U.S. at 450 & 453.

Contrary to the Government's assertion, Resp. Br. 40-44, Petitioner does not contend that the Constitution requires recidivist enhancements to be included in the same indictment that charges the underlying offense. Furthermore, Petitioner's argument does not turn on whether a prior conviction used to enhance a sentence is labeled an "element" of the offense in the traditional

[6] The Government incorrectly asserts that the "Court's ruling in *Graham* that the State need not allege the prior convictions in an indictment was not based on the inapplicability of the right to indictment by a grand jury to the States." Resp. Br. 42 fn. 23. The Government partially quoted the Court's rationale, but left out the following: "And it cannot be contended that in proceeding by information instead of by indictment, there is any violation of the requirement of due process of law. *Hurtado v. California*, 110 U.S. 516 [1884]; . . ." *Graham*, 224 U.S. at 627 (citations omitted). The Court simply pointed out that there is no need for an indictment charging anew the offense the defendant has already been convicted of, and the fact of the previous conviction can be alleged by information.

sense. *See, e.g., People v. Sickles*, 156 N.Y. 541, 546-47, 51 N.E. 288, 290 (1898).

The Court in *Graham*, as pointed out by the Government, Resp. Br. 42, did state that a bifurcated procedure was valid in part because the allegation of a prior conviction "does not relate to the commission of the offense, but goes to punishment only." *Graham*, 224 U.S. at 629. This passage does not support the Government's position. The statement that the previous conviction does not relate to the new offense means only that the existence or not of a prior conviction is unrelated to whether or not the defendant has committed the newly alleged conduct. The statement that the prior conviction "goes to punishment only" means nothing more than that the prior offense itself need not be proved anew, and the defendant has no double jeopardy protection from the enhancement based on the prior conviction because he is not being punished for that offense. The fact of the prior conviction "goes to the punishment only" for the new offense, because it aggravates the guilt for the new offense. *McDonald v. Massachusetts*, 180 U.S. 311, 312-13 (1901); *Moore v. Missouri*, 159 U.S. 673, 676-77 (1895).[7]

C. Courts Did Not Traditionally Sentence Above the Maximum Based on Prior Convictions Absent Formal Allegations and Jury Findings.

It is not true, as the Government asserts, Resp. Br. 39, that here the legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment" and prescribed an effect for that factor. Resp. Br. 38. Nor is 8 U.S.C. § 1326(b)(2) a "congressional

[7] In both *Moore* and *McDonald*, the prior convictions were alleged in the indictment and found by a jury. *Moore*, 159 U.S. at 673; *McDonald*, 180 U.S. at 311 & 313.

codification of traditional sentencing factors. . . . " Resp. Br. 39. Sentencing courts generally considered prior convictions as a factor in assessing punishment only **within** a range prescribed for the offense of conviction. *See* Pet. Br. 33-39.

D. Dangerous Special Offender Statute.

The Government next relies upon circuit authority upholding the validity of the short-lived "dangerous special offenders" statute, 18 U.S.C. § 3575 (repealed). Resp. Br. 39, fn. 21. This Court never passed on the constitutionality of the "dangerous special offenders" statute with regard to the right to a jury, the burden of proof, or the right to indictment.[8]

E. Other Authority.

The Government claims that many of the cases cited by Petitioner concern statutory requirements that a prior conviction be proved as an element of the offense. But the

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[8] Furthermore, the "dangerous special offenders" statute clearly set forth sentencing procedures completely different from normal sentencing procedures which afforded greater procedural protections to the defendant than normally required for sentencing. 18 U.S.C. §§ 3575 & 3576; *United States v. Stewart*, 531 F.2d 326, 332, 334 (6th Cir.) *cert. denied*, 426 U.S. 922 (1976). Thus, the "special offenders statute" did not offend "the established rule . . . [that] unless the statute designates a different mode of procedure, . . . the indictment or information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury. . . . " *Massey v. United States*, 281 F. 293, 297-98 (8th Cir. 1922) (citations omitted); *See Staples v. United* States, 511 U.S. 600, 605-06 (1994) (where there is a firmly embedded rule in the common law, or Anglo-American jurisprudence, Congressional silence will not suffice to supplant the rule). *Accord Liparota v. United States*, 471 U.S. 419, 426 (1985).

two cases cited by the Government, *Massey*, 281 F. at 296-97, and *Singer v. United States*, 278 F. 415, 419-20 (3rd Cir.), *cert. denied*, 258 U.S. 620 (1922) did not involve statutory requirements of a jury finding.[9] Furthermore, the complete uniformity of the statutory and case law informs the Court as to the understanding of the Constitutional requirements. *Printz v. United States*, ___U.S.___, 117 S.Ct. 2365, 2370 (1997). *See also* Pet. Br. 34.

Arguably, 8 U.S.C. § 1326(b)(2) is not a recidivist statute. The statute punishes persons for actions deemed more dangerous because of their status as felons, not their incorrigibility as illegally entering aliens. Thus, 8 U.S.C. § 1326(b)(1) & (2) is much like 18 U.S.C. § 922(g), which punishes felons who possess a weapon. Therefore, the prior conviction is an element of the offense. *See Labonte*, 117 S.Ct. at 1683 (Breyer, J., dissenting).

But, whether it is labeled an element or not, in 8 U.S.C. § 1326(b), Congress deemed a prior conviction to be important enough to increase the maximum punishment to twenty years. The Constitution guarantees that facts deemed important enough to increase the statutory maximum punishment must, in a federal case, be alleged

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[9] The statutes at issue required only that the prosecutor include the prior conviction in the indictment, information or affidavit. *Massey*, 281 F. at 296; *Singer*, 278 F. at 419-20. In *Massey*, the court overruled the defendant's objection to the use of the prior conviction at trial. The court did not rely upon any statutory requirement, but, like the court in *Sickles*, found the requirement that facts which increase punishment must be proved beyond a reasonable doubt so fundamental that it could not be dispensed with even if it prejudiced the defendant. *Massey*, 281 F.2d 296-98.

in the indictment, and proved beyond a reasonable doubt to a jury. That guarantee was violated in this case.

CONCLUSION

For the foregoing reasons, and those set out in Petitioner's opening brief, and the brief of Amicus Curiae NACDL, the judgment of the United States Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

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